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2016]

THERE'S SOMETHING IN THE WATER: THE EHB
DISREGARDS ITS MANDATE AND DISRESPECTS CONTRACT
LAW IN *ROBINSON COAL COMPANY V. DEPARTMENT OF
ENVIRONMENTAL PROTECTION*

I. INTRODUCTION

The first record of Pennsylvania coal production dates back to 1761, in what is now downtown Pittsburgh.¹ The coal mining industry grew slowly at first and sustained a production surge following the Civil War and the Industrial Revolution.² Further, in 1918, the Pennsylvania coal industry experienced its most productive year in response to World War I, when hundreds of thousands of miners produced 227 million tons of coal.³ Today, Pennsylvania is the fourth highest coal-producing state, accounting for approximately sixty thousand tons of coal mined per year.⁴ Despite a long history of coal mining, geologists currently estimate Pennsylvania contains a staggering seventy-six billion tons of coal.⁵ A majority of this coal will remain underground indefinitely, due to the extreme difficulty and high costs associated with recovering it.⁶

While there are numerous methods miners employ to recover coal, underground and strip surface mining are among the most efficient.⁷ Historically, underground mining involved driving a tunnel “along a coal bed[,] either” on the surface “where the coal is exposed[,]” or from an excavated shaft from the surface.⁸ Miners would then excavate additional tunnels, utilizing the “room-and-pillar” method.⁹ This process consists of mining sizable underground

1. See William E. Edmunds, *Coal in Pennsylvania*, PA. GEOLOGICAL SURV., 2 (2002), available at http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_014594.pdf (noting first record of coal mining in Pennsylvania).

2. See *id.* (discussing coal mining early development and growth).

3. See *id.* (explaining coal mining expansion in Pennsylvania's coal industry).

4. See *U.S. Coal Production by State & by Rank*, NAT'L MINING ASS'N, http://www.nma.org/pdf/c_production_state_rank.pdf (last updated Feb. 2016) (reporting top coal-producing states by amount produced in 2014). In 2014, the most recent year for which data is available, Pennsylvania mined sixty thousand tons of coal, or 6.2 percent of the total mined in the United States. *Id.*

5. See Edmunds, *supra* note 1, at 17 (discussing amount of coal left underground).

6. See *id.* (discussing difficulty of retrieving leftover coal).

7. See *id.* at 16-17 (detailing common mining methods).

8. *Id.* at 16 (providing historical mining methodology).

9. See *id.* (highlighting room-and-pillar mining process).

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rooms where workers leave “pillars” of coal to support the rocky ceiling above.¹⁰ Surface mining, on the other hand, requires the excavation of a large amount of land and the removal of the coal contained underground.¹¹ Surface mining is commonly referred to as opencast or open-pit mining.¹²

After mining operations cease, coal mines often leave behind a metal-rich water runoff aptly named acid mine discharge.¹³ This discharge is created when sulphuric rocks react with air and water to form discharge rich in sulphuric acid and iron.¹⁴ This toxic waste threatens the environment and requires treatment in order to prevent potentially significant environmental damage.¹⁵

Pennsylvania’s Environmental Hearing Board (EHB) recently highlighted the importance of coal companies and environmental regulators working together in *Robinson Coal Company v. Department of Environmental Protection*,¹⁶ by rewriting the terms of their agreement.¹⁷ In taking this action, the EHB found that the Pennsylvania Department of Environmental Protection (Department) abused its discretion when it failed to provide Robinson Coal Company (Robinson) with a realistic endpoint for treating the acid mine discharge.¹⁸ In the court’s analysis, however, the EHB wrongly expanded its mandated power and acted more like a court in equity.¹⁹

Part II of this Note provides the factual history of the *Robinson Coal* case.²⁰ Part III addresses the statutory and judicial background fundamental to the EHB’s power to decide appeals regarding the

10. See Edmunds, *supra* note 1, at 16 (explaining room-and-pillar mining method).

11. See *Coal Mining*, WORLD COAL ASS’N, <https://www.worldcoal.org/coal/coal-mining> (last visited Dec. 28, 2015) (describing surface coal mining method).

12. See *id.* (referring to surface coal mining as opencast and open-pit mining).

13. See *Coal Mining & the Environment*, WORLD COAL ASS’N, <http://www.worldcoal.org/environmental-protection/coal-mining-environment> (last visited Feb. 18, 2016) (highlighting environmental threats posed by acid mine drainage).

14. See *Coal Mining & Water*, WORLD COAL ASS’N, <http://www.worldcoal.org/environmental-protection/coal-water> (last visited Feb. 18, 2016) (describing how acid mine drainage is created).

15. See *id.* (noting negative impact of acid mine drainage on environment).

16. No. 2010-186-M, 2015 WL 1501150 (Pa. Env’tl. Hearing Bd. Mar. 16, 2015).

17. For an explanation of how the case proceeded factually, see *infra* notes 25-59 and accompanying text.

18. For a further discussion of the EHB’s reasoning, see *infra* notes 113-150 and accompanying text.

19. For a critical analysis of how the EHB acted outside of its power, see *infra* notes 151-181 and accompanying text.

20. For a further discussion of the factual background of *Robinson Coal*, see *infra* notes 25-59 and accompanying text.

Department's actions.²¹ Part IV examines the *Robinson Coal* court's decision and describes its rationale.²² Next, Part V makes a critical analysis of the EHB's ruling on an order not on appeal, and its subsequent disregard of established contract law.²³ Finally, Part VI of this Note addresses the potential impact of the EHB's unprecedented decision on coal companies in Pennsylvania.²⁴

II. FACTS

A. Activities in the 1980s and 1990s

Robinson Coal Company owned and operated the Putt Mine, a surface coal mine located in Robinson Township, Washington County, Pennsylvania.²⁵ Robinson submitted a mining permit in 1984 in order to begin mining operations and completed site reclamation in 1991.²⁶ Reclamation is the process mining companies must complete once operations cease.²⁷ The purpose of reclamation is to restore the above-ground ecosystem as it was before mining began.²⁸

To ensure reclamation occurs, federal law requires coal companies to purchase a bond to guarantee they will have the finances to later reclaim their mining site.²⁹ Pennsylvania, however, allows coal companies to fund a treatment trust as an alternative to purchasing a bond, in order to provide treatment funds long into

21. For a further discussion of the legal background of surface coal mining regulation, see *infra* notes 60-112 and accompanying text.

22. For a narrative analysis of the EHB's decision and dissent, see *infra* notes 113-150 and accompanying text.

23. For a critical discussion of the EHB's improper expansion of power, see *infra* notes 151-181 and accompanying text.

24. For a discussion of the future impact of *Robinson Coal*, see *infra* notes 182-194 and accompanying text.

25. See *Robinson Coal Co. v. Commonwealth*, No. 2010-186-M, 2015 WL 1501150, at *3 (Pa. Env'tl. Hearing Bd. Mar. 16, 2015) (noting parties to action). The Putt Mine is located approximately fourteen miles southwest of Pittsburgh, Pennsylvania. *Id.*

26. See *id.* (discussing Robinson's activities leading up to dispute). The Department quickly issued the permit, and mining began at the site in 1985. *Id.* "Mining was completed in 1989," at which point Robinson began the reclamation process. *Id.*

27. See *Reclamation*, NAT'L MINING ASS'N, <http://www.miningfacts.org/environment/what-happens-to-mine-sites-after-a-mine-is-closed/> (last visited Feb. 25, 2016) (detailing reclamation process).

28. See *id.* (explaining purposes of mine reclamation).

29. See *Treatment Trust Funds*, PA. DEPARTMENT OF ENVTL. PROTECTION, <http://www.dep.pa.gov/Business/Land/Mining/BureauofDistrictMining/Treatment-TrustFund/Pages/default.aspx#.VqkJKFMrjXg> (last visited Jan. 27, 2016) (explaining treatment bonds and treatment trusts generally required prior to beginning mining operations).

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the future.³⁰ After denying Robinson's bond release request, the Department released the bond in 2003 after the parties negotiated and executed a post-mining treatment trust agreement.³¹

The 1984 Permit allowed Robinson to mine coal from the Putt Mine and to "daylight" antique underground mines on the site.³² "Daylighting" refers to a form of remining, which occurs when coal companies create a surface mine on top of an old underground coal mine to remove leftover coal columns.³³ Daylighting's impact on water discharge quality yields mixed results in Pennsylvania; "remining" activities, however, have substantially reduced acidic mine discharge in Washington County.³⁴

B. Testing the Waters

In response to Robinson's request to release the reclamation bond in 1993, the Department sent a hydrogeologist to conduct a hydrologic investigation at SP-1, a monitoring point at Putt Mine.³⁵ The hydrogeologist concluded the mine's discharge converted from "alkaline to acidic[,] with higher concentrations of iron, manganese and sulfates."³⁶

Less than one year later, in 1994, the Department issued an order directing Robinson to begin provisional treatment of the SP-1 discharge and to submit plans for permanent treatment at the same

30. *See id.* (defining post-mining treatment trusts permitted in Pennsylvania as alternative treatment security).

31. *See Robinson Coal*, 2015 WL 1501150, at *3 (discussing existence of post-mining treatment trust). Post-mining treatment trusts are used throughout the coal mining industry as a means to ensure the mining discharge will be treated, regardless of the operator's future solvency. *Id.* For an explanation of the 2002 CO&A, see *infra* notes 45-48 and accompanying text.

32. *See Robinson Coal*, 2015 WL 1501150, at *3 (noting Robinson's activities at Putt Mine).

33. *See* Jay W. Hawkins, *Remining Coal*, LEHIGH ENVTL. INQUIRY, <http://www.ei.lehigh.edu/envirosci/enviroissue/amd/links/remining.html> (last visited Feb. 19, 2015) (providing in-depth discussion regarding remining and daylighting). This is an efficient process because oftentimes, old underground mines leave behind large amounts of coal due to technological limitations. *Id.* In Washington County specifically, the court noted old underground mines generally left about twenty to thirty percent of the coal. *Robinson Coal*, 2015 WL 1501150, at *3.

34. *See* Hawkins, *supra* note 33 (discussing daylighting benefits to water discharge quality). Remining activities in other counties in Pennsylvania, including Greene and Tioga Counties, generally increase discharge acidity. *Id.*

35. *See Robinson Coal*, 2015 WL 1501150, at *4 (discussing hydrologic investigation initiated by reclamation bond's release request).

36. *See id.* (detailing findings of hydrogeologist's report). Additionally, the hydrogeologist recommended Robinson acquire a permit to daylight an adjacent mine. *Id.* *Id.* In 1998, Robinson daylighted an adjacent mine. *Id.*



location.³⁷ Robinson appealed the order to the EHB and the parties subsequently settled and executed the 1994 Consent Order and Agreement (1994 CO&A).³⁸ Per the 1994 CO&A, Robinson agreed to upgrade the existing treatment system, evaluate other treatment plans, submit a permanent treatment plan, and install a permanent treatment system at SP-1.³⁹

Robinson's new treatment system consisted of two parts: 1) an anoxic (oxygen deprived) limestone drain (ALD) and 2) a settling basin.⁴⁰ An ALD is a system of limestone trenches with flowing anoxic water to reduce the water discharge's acidity.⁴¹ A settling basin is then used to slow the water discharge rate so gravity can remove remaining iron and other toxic substances from the water.⁴² The system provided for the polluted water to flow "out of the ALD through an outlet pipe and then [] into the settling basin."⁴³ From the settling basin, the acid mine discharge ran past the permit boundary and into the North Branch of Robinson Run, a nearby stream.⁴⁴

In November 2002, Robinson and the Department entered into the Treatment Trust Consent Order and Agreement (2002 CO&A).⁴⁵ This agreement required Robinson to adhere to certain statutory water discharge standards and to maintain the treatment system forever, "or until water treatment is no longer necessary."⁴⁶

37. *See id.* (discussing 1994 Order). In response to the 1994 Order, Robinson promptly installed a temporary water treatment system at SP-1. *Id.*

38. *See id.* at *5 (discussing Robinson's appeal of 1994 Order).

39. *See id.* (highlighting details of 1994 CO&A entered into between parties).

40. *See Robinson Coal*, 2015 WL 1501150, at *5 (discussing Robinson's treatment system). ALD treatment systems similar to the one used here are some of the cheapest and least chemically intensive means of treating acidic mine discharge. *Id.*

41. *See* Jeff Skousen, *Overview of Passive Systems for Treating Acid Mine Drainage*, WEST BRANCH SUSQUEHANNA RESTORATION COALITION, http://www.wbsrc.org/uploads/2/5/6/0/25607137/97_passive_trt_overview.pdf (last visited Feb. 18, 2016) (describing ALD systems and how they function). The main advantage of an ALD system is that it is effective and does not require the use of chemicals. *Id.*

42. *See Reference Guide to Treatment Technologies for Mining-Influenced Water*, EPA 85, (March 2014), available at https://clu-in.org/download/issues/mining/Reference_Guide_to_Treatment_Technologies_for_MIW.pdf [hereinafter *Reference Guide to Treatment Technologies*] (describing purpose of settling basin).

43. *Robinson Coal*, 2015 WL 1501150, at *5 (explaining passive treatment system's design).

44. *See id.* at *6 (describing system's final discharge location).

45. *See id.* (noting existence of 2002 Trust CO&A).

46. *See id.* (detailing specific requirements of 2002 CO&A). The agreement made no mention of how to determine when discharge treatment "is no longer necessary." *Id.* at *7. Additionally, the agreement required the Department to schedule annual meetings; the Department failed to do this until 2010, only at Robinson's bequest. *Id.*

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As part of the agreement, the Department released \$200,969 in reclamation bonds to Robinson, upon Robinson's \$25,893 funding of a reclamation treatment trust.⁴⁷ Additionally, the parties agreed that the permit boundary, located after the ALD and the settling basin, would be the compliance sampling point.⁴⁸

C. The Department's 2010 Order

After substantial remedial activity, the Department subjected Robinson to tests in order to determine compliance with Pennsylvania's environmental protection statute.⁴⁹ On October 13, 2010, the Department's Mining Conservation Inspector, Jeffrey Kohut, collected a sample from the settling basin's outlet.⁵⁰ The proper compliance point, however, was the "permit boundary," as dictated by the 2002 CO&A.⁵¹ Mr. Kohut did not collect the sample from the agreed upon compliance point, but the Department still issued a field order (2010 Order) to Robinson on November 17, 2010, based on Mr. Kohut's findings.⁵²

The 2010 Order included an itemized account of Robinson's failure to comply with the regulations.⁵³ The first paragraph of the 2010 Order detailed Robinson's violation of the Section 87.102 water discharge limitations.⁵⁴ The second paragraph explained Robinson's failure to adhere to Sections 87.116 and 87.117, which required the company to submit quarterly water quality reports to the Department.⁵⁵ After a meeting and discussion regarding the proper compliance point, the Department vacated the first para-

47. *See id.* at *7 (examining terms to 2002 CO&A).

48. *See Robinson Coal*, 2015 WL 1501150, at *8 (establishing compliance point).

49. *See id.* (noting statutory effluent limits as "acidity less than alkalinity and . . . iron concentration less than 7mg/l"); *see also* 25 PA. CODE § 87.102 (2016) (stating effluent limits).

50. *See Robinson Coal*, 2015 WL 1501150, at *10 (discussing November 2010 sample). The sample showed an iron concentration of 12.4 mg/l, substantially higher than the statutory effluent limits. *Id.*

51. *See id.* at *8 (noting mutually agreed-upon compliance point).

52. *See id.* at *11 (discussing 2010 Order issued based on sampling results of non-agreed upon compliance point). The 2010 Order was based on Robinson's violation of the effluent limitations in Section 87.102(a) and "failure to submit quarterly water quality monitoring reports as required by Sections 87.116 and 87.117[.]" *Id.* *See also* 25 PA. CODE §§ 87.116, 87.117 (2016) (stating compliance standards).

53. *Robinson Coal*, 2015 WL 1501150, at *11 (describing 2010 Order).

54. *See id.* (detailing paragraph one of 2010 Order).

55. *See id.* (explaining paragraph two of 2010 Order).

graph because Mr. Kohut failed to use the agreed-upon point.⁵⁶ Later, the Department withdrew the second paragraph after Robinson offered past-due water quality reports.⁵⁷

Although the Department vacated the entire 2010 Order, Robinson was still not in compliance with the statutory discharge limits for iron at the proper compliance point, the permit boundary.⁵⁸ Despite the fact that the Department lifted the 2010 Order and did not impose civil penalties, Robinson appealed the order, arguing 1) it always met the applicable effluent limitations, and 2) it always submitted quarterly monitoring results.⁵⁹

III. BACKGROUND

Acid mine drainage from surface mining is one of the most dangerous problems facing coal-mining areas because its harmful effects can last decades after mining operations end.⁶⁰ Specifically, surface mining has contaminated more than three thousand miles of rivers and streams in Pennsylvania.⁶¹ Surface mining is more economical than underground mining, however, so coal companies inevitably view regulating surface mining as a serious threat to profitability.⁶²

A. Congress Stands Up to King Coal

As of 2014, Washington County contains approximately 1,300 lawfully permitted acres undergoing surface coal mining activities.⁶³

56. *See id.* at *12 (noting Department's actions due to prior agreed upon compliance point).

57. *See id.* (highlighting Robinson's eventual compliance with Sections 187.116 and 187.117).

58. *See Robinson Coal*, 2015 WL 1501150, at *12 (noting continued violation at Putt Mine). However, the discharge consistently meets the "alkalinity greater than acidity" requirement. *Id.*

59. *See id.* at *1 (summarizing issues on appeal).

60. *See Acid Mine Drainage*, EARTHWORKS, https://www.earthworkSACTION.org/issues/detail/acid_mine_drainage (last visited Sept. 4, 2015) (detailing pollution associated with acid mine drainage).

61. *Coal-Mine-Drainage Projects in Pennsylvania*, USGS, <http://pa.water.usgs.gov/projects/energy/amd/> (last updated Oct. 26, 2010, 2:52 PM) (noting pollution impact on Pennsylvania waters). The USGS estimates restoration costs for damaged watersheds to be up to fifteen billion dollars. *Id.*

62. *See* William Hofmann & Steven Horst, Note, *The EHB: DEP's Friend or Foe? Environmental Hearing Board Review*, 15 VILL. ENVTL. L.J. 173, 182-86 (2004) (discussing surface mining regulations).

63. *See 2014 Bituminous Surface Mines Reporting Production – Listed by County*, PA. DEPARTMENT OF ENVTL. PROTECTION 15, http://files.dep.state.pa.us/Mining/BureauOfMiningPrograms/BMPPortalFiles/Annual_Reports/BituminousAnnualReports/2014/2014BituminousSurfaceMines_ListedbyCounty.pdf (last visited Feb. 18, 2016) (detailing surface mining amounts by county).

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Areas surrounding these coal mines are often exposed to polluted surface and ground water that adversely affects the health of neighboring communities.⁶⁴ Ultimately, similar dangers threatening the environment and community health persuaded Congress to pass the first version of the Surface Mining Control and Reclamation Act (SMCRA) in 1975.⁶⁵ Citing economic concerns, President Gerald Ford vetoed this early version of the SMCRA.⁶⁶ After additional hearings regarding the economic and environmental impact of SMCRA in both the House and Senate, the bill passed and President Jimmy Carter signed it into law in the summer of 1977.⁶⁷

In the SMCRA's findings section, Congress described the coal industry's economic importance as well as its ability to "adversely affect commerce and the public welfare[,] by destroying land value and polluting water supplies."⁶⁸ The House Subcommittee on Energy and the Environment also held hearings to discuss dangerous water pollution caused by surface coal mining.⁶⁹ Importantly, Congress included a provision recognizing the difficulty in making a single, overarching law applicable to all states.⁷⁰ Therefore, lawmakers delegated primary governmental responsibility for the bill to the States.⁷¹ Congress further established the Office of Surface Mining Reclamation and Enforcement (Office) to administer the program and to assist states in developing regulations conforming to federal minimums and local environmental condi-

64. See *Abandoned Mine Site Characterization and Cleanup Handbook*, EPA (Aug. 2000), http://www.epa.gov/sites/production/files/2015-09/documents/2000_08_pdfs_amsch.pdf (explaining dangers of acid mine drainage to drinking water).

65. See Robert A. Waters, Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775, 776-77 (1979) (detailing legislative history of SMCRA).

66. See *id.* at 778 (noting President Ford's veto).

67. See *id.* at 780-81 (detailing bill history after 1975 veto).

68. 30 U.S.C. § 1201(a)-(d) (2012) (detailing Congressional findings). Additionally, the bill author noted reclamation technology is more advanced and effective at coal mine remediation and reclamation. *Id.* According to Congress, the constitutional power used to justify this bill is the commerce clause, and the ability to regulate interstate commerce. *Id.*

69. See *Reclamation Practices and Environmental Problems of Surface Mining: Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment*, 95th Cong. 91 (1977) (detailing Sierra Club Mining Policy and including environmental impact data).

70. 30 U.S.C. § 1201(f) (2012) (discussing Congressional intent regarding law).

71. See § 1201(f) (noting applicability to states).

tions.⁷² The Office's principal role, however, was to ensure that states complied with the federal program.⁷³

Before SMCRA was enacted, states varied in the ways they regulated surface mining.⁷⁴ Some state officials opposed SMCRA because they believed most states had developed sufficient regulations during the 1970s.⁷⁵ Congress, however, did not alter its course.⁷⁶ Instead, it passed SMCRA partially because of its concerns regarding states' attempts to protect their lucrative coal industries.⁷⁷ Today, Congress's concerns still prove legitimate: the Pennsylvania coal industry employs approximately 41,577 people and generates billions of dollars annually.⁷⁸

B. Pennsylvania's Plan

Prior to Congress's enactment of SMCRA, Pennsylvania maintained a well-established and thorough system of surface coal mining regulation.⁷⁹ Consequently, the federal SMCRA is largely similar to Pennsylvania's version of SMCRA.⁸⁰ When SMCRA was enacted, Pennsylvania could no longer administer its regulatory

72. See § 1211(a)-(c) (establishing and highlighting duties of office).

73. See § 1211 (detailing duties of Surface Mining Reclamation and Enforcement office). The Secretary of the Interior also has the power to approve or reject state programs. *Id.*

74. See K. W. James Rochow, Note, *The Far Side of Paradox: State Regulation of the Environmental Effects of Coal Mining*, 81 W. VA. L. REV. 559, 560 (1979) (describing coal mining regulatory history before SMCRA). The "paradox" in the article's title refers to how the SMCRA came about due to the states' inability to regulate effectively, while at the same time conferring upon the states the duty to enforce the act. *Id.* at 559-60.

75. See *id.* (noting state official's criticism of Act).

76. See *id.* (detailing Congressional action).

77. See *id.* (describing Congressional intent behind passing regulations).

78. See *The Economic Impact of the Coal Industry in Pennsylvania*, PA. ECON. LEAGUE OF S.W. PA. (Apr. 2010), <http://www.alleghenyconference.org/PennsylvaniaEconomyLeague/PDFs/EconomicImpactAnalyses/EconomicImpactOfCoalIndustryInPa0410.pdf> (discussing specific economic consequences and opportunities through Pennsylvania's coal industry).

79. 123 CONG. REC. 12, 872 (1977) (including statements recognizing efficiency of Pennsylvania's reclamation program). In fact, the first director of the Office was Walter Heine, the former associate deputy secretary in the DEP's predecessor, the Pennsylvania Department of Environmental Resources. See Gerhard Peters & John T. Woodley, *Department of the Interior Nomination of Walter N. Heine to be Director of the Office of Surface Mining Reclamation and Enforcement*, THE AM. PRESIDENCY PROJECT, 1 (Oct. 17, 1977), <http://www.presidency.ucsb.edu/ws/?pid=6805> (providing biographical information on Mr. Heine).

80. See generally John C. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Coop. Federalism" Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REFORM 903, 905-08 (1986) (giving broad overview of differences between Federal SMCRA and Pennsylvania SMCRA).

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program as before; from 1977 on, Pennsylvania's surface coal mining regulatory system was preempted by the federal SMCRA and thus subject to continuous oversight.⁸¹

By the 1980s, the Pennsylvania General Assembly established a body of state laws, compliant with federal minimums, to combat environmental damage resulting from its mining industry.⁸² By passing these laws, the General Assembly established a system of enforcement overseen by the Department.⁸³ The purpose of Pennsylvania's Surface Mining and Reclamation Act was to:

[A]ssure that the coal supply essential to the Nation's and the Commonwealth's energy requirements, and to their economic and social well-being, is provided and to strike a balance between protection of the environment and agricultural productivity and the Nation's and the Commonwealth's need for coal as an essential source of energy.⁸⁴

Chapter 87 of the Pennsylvania Code's Environmental Protection title enables the Department to enforce plans, permits, mining, and performance standards.⁸⁵ The current regulatory system in Pennsylvania is considered superior to the prior system because it blends the strengths of the state and federal regulations.⁸⁶ After beginning mining operations, the Department shifts its focus to the most contentious portion of its regulation: performance standards for surface mines.⁸⁷

81. See *id.* at 960 (noting differences between pre-1977 regulatory scheme and post-1977 regulatory scheme).

82. See *Administrative Code of 1929*, 71 PA. CONS. STAT. §§ 510-520 (1985) (establishing purpose of statute regulating environmental damage); *Clean Streams Law*, 35 PA. CONS. STAT. §§ 691.1-702 (1985) (same); *Bituminous Mining Subsidence and Land Conservation Act of 1966*, 52 PA. CONS. STAT. §§ 1406.1-21 (1985) (same); *Surface Mining Conservation and Reclamation Act*, 52 PA. CONS. STAT. §§ 1396.1-31 (1985) (same).

83. See generally *Bureau of Mining Programs*, PA. DEPARTMENT OF ENVTL. PROTECTION, http://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Pages/default.aspx#.Vqo_fMrKkZ (last visited Jan. 28, 2016) (discussing Department's Bureau of Mining Programs, which oversees Pennsylvania coal companies and has authority to administer Pennsylvania's coal mining regulations).

84. 52 PA. CONS. STAT. § 1396.1 (1985) (explaining purpose of Surface Mining Conservation and Reclamation Act).

85. See generally 25 PA. CODE 87 (2016) (providing surface coal mining regulations).

86. See Dernbach, *supra* note 80, at 965 (describing current system's superiority to 1977 system).

87. See 25 PA. CODE §§ 87.91-181 (2016) (listing performance standards and other regulations).

C. Performance Standards for Surface Mines

The Department enforces detailed requirements to which all coal mine operators in Pennsylvania must adhere.⁸⁸ For example, the Department strictly enforces statutory standards for acid mine discharge from surface coal mines.⁸⁹ In addition to specifying the maximum allowable levels of iron, manganese, pH, and acidity, the requirements compel coal companies to install passive treatment systems in order to comply fully.⁹⁰ Passive treatment systems are preferable to active systems due to their relative inexpensiveness, lack of chemicals, and significant reduction in overall system maintenance.⁹¹

In addition to providing effluent limitations, the regulations also require surface mine operators to monitor and submit groundwater and surface water quality reports to the Department on a quarterly basis.⁹² This requirement allows the Department to easily monitor acid mine discharge levels, but its success, however, ultimately turns on whether coal companies comply with their obligations.⁹³

D. The EHB as an Independent, Quasi-Judicial Agency

The General Assembly established the EHB in 1970 as part of the Department.⁹⁴ In 1988, however, the EHB became independent of the Department.⁹⁵ The EHB, “operat[ing] like a court,” provides a forum to challenge the Department’s actions.⁹⁶ Additionally, the EHB’s power is primarily limited to reviewing the De-

88. See §§ 87.91-181 (listing all performance standards applicable to surface mine operators).

89. See § 87.102 (stating effluent limitation standards).

90. See § 87.102(e) (detailing post-mining pollution discharge standards). In addition to reducing the iron, manganese, pH, and acidity, the passive treatment system also must be able to operate effectively for fifteen to twenty years. § 87.102(e)(4)(vi).

91. K.L. Ford, *Passive Treatment Systems for Acid Mine Drainage*, BUREAU OF LAND MGMT. 6, (Apr. 2003), <http://www.blm.gov/nstc/library/pdf/TN409.pdf> (discussing advantages of passive treatment systems).

92. See 25 PA. CODE §§ 87.116-117 (2016) (stating standards for monitoring and reporting water discharge).

93. See §§ 87.116-117 (detailing regulation requirements regarding discharge levels).

94. See *Annual Report 2014*, PA. ENVTL. HEARING BOARD, <http://ehb.courtapps.com/content/2014AnnualReport.pdf> (last visited Sept. 9, 2015) (detailing history of EHB).

95. See 35 PA. CONS. STAT. § 7514(a) (1988) (delineating EHB’s jurisdiction).

96. *History of the Environmental Hearing Board*, PA. ENVTL. HEARING BOARD, http://ehb.courtapps.com/content/ehb_history.php (last visited Sept. 9, 2015) (describing EHB’s similarities to courts).

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partment's actions.⁹⁷ The statute defines an "action" as an "order, decree, decision, determination or ruling by the Department affecting . . . obligations of a person including . . . a permit, license, approval or certification."⁹⁸ Notably, the EHB does not have jurisdiction over orders or rulings that simply affirm a party's preexisting obligations.⁹⁹

Moreover, because the EHB is analogous to a court, opinions must comport with general contract law.¹⁰⁰ A consent order and agreement is a contract, so the EHB must interpret such agreements consistent with the bargained-for exchange the parties reasonably expected.¹⁰¹ Courts generally disfavor rewriting contract terms, which would alter the parties' original agreement.¹⁰²

Moreover, the EHB has consistently rejected appeals of actions being used by parties to attack another Department action that was not on appeal.¹⁰³ In *Winegardner v. Commonwealth*,¹⁰⁴ for example, the EHB held that its review was limited only to the action appealed.¹⁰⁵ The EHB stated it could not employ "an appeal from

97. See *Redbank Valley Mun. Auth. v. Commonwealth*, No. 2005-262-L, 2006 EHB 813, 819 (Pa. Envtl. Hearing Bd. Nov. 9, 2006) (discussing EHB's reviewing powers).

98. *Chesapeake Appalachia, L.L.C. v. Commonwealth*, 89 A.3d 724, 726 (Pa. Commw. Ct. 2014) (defining "action") (citing 25 PA. CODE § 1021.2(a) (2016)).

99. See *id.* at 727-28 (holding EHB cannot review Department orders simply reiterating ongoing obligations).

100. See *Robinson Coal Co. v. Commonwealth*, No. 2010-186-M, 2015 WL 1501150, at *27 (Pa. Envtl. Hearing Bd. Mar. 16, 2015) (explaining EHB acts as court and must adhere to established contract law).

101. See *Global Eco-Logical Services, Inc. v. Commonwealth*, 2001 EHB 99 (holding contract law principles govern consent orders and agreements), *aff'd*, 789 A.2d 789 (Pa. Cmmw. Ct. 2001). The basic underlying principle of contract law is to protect bargained-for expectations of the parties. See *Hazleton Area Sch. Dist. v. Bosak*, 671 A.2d 277, 282-83 (Pa. Commw. Ct. 1996) (protecting bargained-for exchange of parties).

102. See *generally* *Commonwealth v. U.S. Steel Corp.*, 325 A.2d 324 (Pa. Commw. Ct. 1974) (holding court should not modify contract absent fraud, accident, or mistake).

103. See, e.g., *Greif Packaging, L.L.C. v. Commonwealth*, 2012 EHB 85, 88 (Pa. Envtl. Hearing Bd. Apr. 12, 2012) (holding parties may not raise issues related to other orders); *Love v. Commonwealth*, 2010 EHB 523, 525 (Pa. Envtl. Hearing Bd. July 12, 2010) (holding same as *Greif Packaging*); *Northampton Twp. v. Commonwealth*, 2008 EHB 563, 568 (Pa. Envtl. Hearing Bd. Oct. 14, 2008) (holding same as *Greif Packaging*); *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 303 n.7 (Pa. Commw. Ct. 1994) (holding same as *Greif Packaging*) (citing *Fuller v. Dep't of Envtl. Res.*, 599 A.2d 248 (Pa. Commw. Ct. 1991)).

104. No. 2002-003-L, 2002 WL 31115001 (Pa. Envtl. Hearing Bd. Sept. 17, 2002).

105. *Id.* at *2-4 (finding EHB's role limited to order on appeal).



one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions.”¹⁰⁶

Importantly, when the Department acts with discretionary regulatory authority, the EHB must determine whether the Department abused its discretion.¹⁰⁷ In *Browning-Ferris Industries, Inc. v. Department of Environmental Protection*,¹⁰⁸ the court held “[if] the record demonstrate[s] the Department abused its discretion, the EHB [can] substitute its discretion for that of the Department.”¹⁰⁹ In *Browning-Ferris*, a landfill company appealed an EHB order to the Commonwealth Court of Pennsylvania.¹¹⁰ The at-issue EHB ruling rescinded a prior Department order that previously allowed the company to increase the volume of its landfill.¹¹¹ The Commonwealth Court reversed the EHB’s order, holding the Department properly conducted business within its delegated discretion.¹¹²

IV. NARRATIVE ANALYSIS

In *Robinson Coal*, the EHB addressed Robinson’s appeal of the Department’s 2010 Order concerning enforcement of the 2002 CO&A.¹¹³ The 2010 Order enforced two duties regarding Robinson’s obligations from the 2002 CO&A to provide treatment for post-mining discharge at Putt Mine.¹¹⁴ Although Robinson resolved those obligations, the EHB sought to determine whether treatment was still necessary at the site as part of its decision.¹¹⁵

106. *Id.* (providing EHB’s limitation on reviewing prior actions).

107. *See* *Warren Sand & Gravel Co., Inc. v. Dep’t of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Commw. Ct. 1975) (holding when Department acts with discretionary authority, EHB determines whether they abused their discretion).

108. 819 A.2d 148 (Pa. Commw. Ct. 2003).

109. *See id.* at 153 (discussing standard on review of EHB order).

110. *See id.* at 150 (noting procedural posture).

111. *Id.* at 150-51 (discussing facts). Additionally, the EHB sustained the homeowners’ appeal of the Department’s action. *Id.*

112. *Id.* at 154 (reversing EHB order to hold for Department).

113. *See Robinson Coal Co. v. Commonwealth*, No. 2010-186-M, 2015 WL 1501150, at *1-2 (Pa. Envtl. Hearing Bd. Mar. 16, 2015) (discussing appeal of Department’s 2010 order).

114. *Id.* at *12 (noting 2010 Order obligations).

115. *Id.* (stating overall issue on appeal). For a further discussion of Robinson’s obligations under the 2002 CO&A, see *supra* notes 45-48 and accompanying text.

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A. Was Treatment Still Necessary?

The central question the parties disputed was whether treatment of the acid mine discharge was still necessary.¹¹⁶ The court quickly dispensed of this issue, stating the answer to Robinson's claim was "fairly easy to [answer]."¹¹⁷ The issue's significance, however, is evident: if treatment was no longer necessary, Robinson would not be obligated to perform its duties listed in the 2002 CO&A.¹¹⁸ If that was the case, Robinson would be discharged from its treatment duties and would have the treatment trust fund monies returned.¹¹⁹ Therefore, it was vital for the EHB to determine if treatment was still required.¹²⁰

In answering this "fairly easy" question, the EHB initially noted the parties agreed "the discharge from the [correct compliance point did] not meet the current regulatory discharge limits for iron [content]."¹²¹ The EHB decided that while the ALD portion of the treatment system may or may not still be necessary, the settling basin was still required to reduce the discharge's iron content.¹²²

While the EHB acknowledged the water discharge quality's gradual improvement over time, it elected not to wait for the discharge to meet the statutory effluent limitations before making its ruling.¹²³ Because the discharge failed to satisfy the statutory limitations, the EHB decided Robinson had not established that treatment was no longer necessary.¹²⁴ The EHB further decided it would "address [the] issue that the Parties neglected to resolve when they negotiated the [2002 CO&A]."¹²⁵

B. When Will Treatment Be No Longer Necessary?

As the EHB stated in its opinion to Robinson's 2011 Motion for Summary Judgment, "the [true] problem in [the dispute was] the parties' [inability,] in [the 2002 CO&A] . . . [to] establish[] []

116. See *Robinson Coal*, 2015 WL 1501150, at *16 (noting parties' positions on issue).

117. *Id.* (footnote omitted) (stating answer to Robinson's question was simple).

118. *Id.* (discussing Robinson's position).

119. See *id.* at *16-17 (discussing financial assurance in 2002 CO&A).

120. *Robinson Coal*, 2015 WL 1501150, at *16 (noting parties' disagreement regarding Robinson's continuing treatment obligations).

121. *Id.* at *16-17 (noting ALD outlet discharge's iron content).

122. *Id.* at *17 (finding settling basin still necessary to reduce iron levels).

123. See *id.* (stating reasoning for decision).

124. *Id.* at *18 (holding that treatment is still required).

125. *Robinson Coal*, 2015 WL 1501150, at *17-18 (addressing when treatment will no longer be necessary).

procedures for Robinson to [prove] that treatment . . . [was] no longer necessary.”¹²⁶ The EHB quickly dispelled Robinson’s claim that it was not required to treat the discharge because the system was working as designed.¹²⁷ The EHB reasoned that, even if true, Robinson’s argument ignored the fact that the discharge did not meet the statutory effluent limitations.¹²⁸ Furthermore, the court continually highlighted “all of the Department’s efforts to avoid responding to Robinson’s repeated assertion that treatment is no longer necessary.”¹²⁹

The EHB qualified the Department’s position that treatment will forever be necessary by instead holding it will not be necessary once discharge consistently meets the Section 87.102 limitations.¹³⁰ In making this decision, the EHB moved the compliance point from the permit boundary to the ALD outlet, which eliminated the settling basin benefits from compliance testing.¹³¹

The EHB provided three reasons to support its finding.¹³² First, the EHB recognized the difficulty of measuring effluent levels at the ALD outlet, but determined that without the new compliance point, there would be no way to eventually release Robinson from its obligations.¹³³ Therefore, the EHB sought to move the compliance point to prevent Robinson from perpetual treatment.¹³⁴ Second, the EHB noted Robinson had expended time, money, and effort reclaiming the site for several years, which ultimately improved discharge quality.¹³⁵ Due to the Department’s failure to recognize Robinson’s efforts, the EHB allowed Robinson to use the

126. *Id.* at *18 (quoting *Robinson Coal Co. v. Commonwealth*, No. 2010-186-M, 2011 WL 6934393, at *9 (Pa. Env’tl. Hearing Bd. Dec. 23, 2011)) (stating underlying problems with appeal).

127. *Id.* (noting Robinson’s position).

128. *Id.* at *17-18 (detailing iron levels in discharge).

129. *Id.* at *16 (highlighting Department’s efforts to avoid responding to Robinson).

130. *See Robinson Coal*, 2015 WL 1501150, at *18 (footnote omitted) (deciding when treatment will not be necessary).

131. *See id.* at *8 (noting original compliance point as permit boundary). The permit boundary is not the same point as the ALD outlet. *Id.* The ALD outlet was simply a different sampling point originally used to evaluate whether ALD discharge met the statutory effluent limit for acidity less than alkalinity. *Id.*

132. *Id.* at *18-19 (establishing three reasons to support its findings).

133. *Id.* at *18 (discussing new compliance point). If there were no place to measure compliance, Robinson would have to treat the discharge in perpetuity. *Id.*

134. *Id.* (discussing reasoning for new compliance point).

135. *Robinson Coal*, 2015 WL 1501150, at *19 (detailing Robinson’s reclamation activities).

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ALD outlet as the compliance point.¹³⁶ Third, the EHB rejected the Department's position in the 2002 CO&A that Robinson was to treat the discharge forever without an opportunity to prove treatment was unnecessary.¹³⁷ Due to the Department's failure to afford Robinson an opportunity to prove treatment was no longer necessary, the EHB found that the Department abused its discretion and thus, the EHB "substitute[d] its discretion for that of the Department."¹³⁸

With this ruling, the EHB decided to step in and provide the parties with an answer due to, in part, the Department's refusal to discuss the question with Robinson.¹³⁹ Moreover, the EHB emphasized the difficulty of getting an answer from the Department regarding how Robinson could terminate its obligations under the 2002 CO&A.¹⁴⁰ To this end, the EHB continually identified the underlying problem was simply "the parties failure in 2002 to include language in their 2002 CO&A that establishes agreed to procedures for Robinson to demonstrate that treatment . . . requirements are no longer necessary."¹⁴¹

C. The Vigorous Dissent

Concurring in part and dissenting in part, Judge Labuskes issued the lone retort.¹⁴² Judge Labuskes briefly described the appeal's procedure and stated that the matter could have concluded once the Department vacated the first and second paragraphs of the 2010 Order.¹⁴³ Judge Labuskes' dissent examined the rules constraining the EHB's power, and articulated specific reasons why the EHB lacked authority to rule on the 2002 CO&A.¹⁴⁴ The dis-

136. *Id.* (noting reasoning for establishing new compliance point).

137. *Id.* (discussing Department's extreme position).

138. *See id.* at *10 n.7 (establishing Department's abuse of discretion); *See also* *Browning-Ferris Indus., Inc. v. Dep't of Env'tl. Prot.*, 819 A.2d 148, 153 (Pa. Commw. Ct. 2003) (describing EHB's standard of review). "[T]he EHB [can] substitute its discretion for that of the Department." *Id.*

139. *Robinson Coal*, 2015 WL 1501150, at *18-19 (noting reason for decision).

140. *Id.* at *2 (detailing Department's lack of responsiveness).

141. *Id.* (identifying parties initial problem in appeal).

142. *Id.* at *23 (Labuskes, J., concurring in part, and dissenting in part) (introducing dissent).

143. *Id.* (describing appeal).

144. *Robinson Coal*, 2015 WL 1501150, at *23 (disagreeing with majority's analytical framework). The dissent noted that the EHB never had jurisdiction over the 2010 Order because that order merely "embodied a finding that Robinson's preexisting obligations are continuing, [which] is not an appealable action." *Id.* at *24. The EHB has no power to review Department orders that reiterate ongoing party obligations. *See Chesapeake Appalachia, L.L.C. v. Dep't of Env'tl. Prot.*, 89

sent argued the only order on appeal was the 2010 Order, while the majority essentially traveled “back in time” to find the Department abused its discretion in the 2002 CO&A.¹⁴⁵ Judge Labuskes described the majority’s action as a “slippery slope” because Robinson never attacked the validity of the 2002 CO&A in this appeal.¹⁴⁶

The dissent also took issue with how the majority, “acting essentially as a court in equity,” inserted and altered terms in the 2002 CO&A.¹⁴⁷ The dissent specifically argued the EHB “ignored [] well-established principles” when it disregarded the “bargained-for expectations of [Robinson and the Department].”¹⁴⁸ Judge Labuskes expressed his frustration with the majority’s emphatic “dissatis[faction] with the Department’s [] lack of responsiveness regarding Robinson’s [legal obligations].”¹⁴⁹ Judge Labuskes concluded his opinion by framing the majority’s justification as an “illusory situation where[] Robinson [was] a frustrated suitor desperately seeking an answer from a reluctant flame,” and the EHB “step[ped] in as Aphrodite . . . to help Melanion prevail over Atlanta.”¹⁵⁰

V. CRITICAL ANALYSIS

The EHB determined that the Department abused its discretion when it failed to provide a method for Robinson to prove treatment was no longer necessary.¹⁵¹ The court’s overemphasis on the Department’s unresponsiveness to Robinson’s inquiries clouded its judgment and inspired the EHB to improperly act as a court in eq-

A.3d 724, 726 (Pa. Commw. Ct. 2014) (concluding EHB lacked jurisdiction over appeal).

145. *Robinson Coal*, 2015 WL 1501150, at *26 (Labuskes, J., concurring in part, and dissenting in part) (detailing flaws in majority opinion).

146. *Id.* (rejecting majority’s analytical framework).

147. *See id.* at *23-24, *27-28 (noting that decision disregarded contract law).

148. *Id.* at *28-29 (rejecting majority’s changes to 2002 CO&A and interpretation of contract law).

149. *Id.* at *30 (discussing majority’s justification for actions).

150. *Robinson Coal*, 2015 WL 1501150, at *30 (Labuskes, J., concurring in part, and dissenting in part) (concluding opinion). Judge Labuskes refers to a Greek myth, in which Melanion, who, after falling in love with Atlanta, prayed to the goddess of love, Aphrodite, for assistance. *See Atlanta*, GREEKMYTHOLOGY.COM, <http://www.greekmythology.com/Myths/Heroes/Atlanta/atlanta.html> (last visited Sept. 23, 2015) (describing Atlanta’s character and significance in Greek mythology). Aphrodite gave Melanion golden apples, which he used to win a race and Atlanta’s heart. *Id.*

151. For a discussion on how the majority reasoned that the Department abused its discretion, see *supra* notes 138-140 and accompanying text.

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uity.¹⁵² Furthermore, the EHB ignored some of contract law's well-established principles.¹⁵³ The EHB's final solution does not resolve the issue; rather, it unintentionally condemned Robinson to eternal treatment of the Putt Mine discharge when it moved the agreed-upon compliance point.¹⁵⁴

A. The EHB Acted Beyond its Power

The EHB overlooked precedent by permitting this appeal because the 2010 Order did not constitute a "Department action" for purposes of EHB jurisdiction.¹⁵⁵ The 2010 Order did not affect Robinson's "personal or property rights, privileges, immunities, duties, liabilities or obligations," but rather, it merely alleged violation of Robinson's "already existing obligations and, thus, d[id] not constitute an 'action.'"¹⁵⁶ The 2010 Order merely informed Robinson of statutory violations, it did not actually order Robinson to do anything besides comply with the 2002 CO&A.¹⁵⁷

The EHB violated one of its own fundamental rules when it found an abuse of discretion in the 2002 CO&A, despite the fact that it was not the "Department action" before the court.¹⁵⁸ This rule, legislatively prescribed in the EHB's governing statute and judicially confirmed in *Winegardner*, limits the EHB's power only to the action on appeal.¹⁵⁹ In this respect, the EHB ignored its juris-

152. See *Robinson Coal*, 2015 WL 1501150, at *2 (noting difficulties with Department). Specifically, the EHB stated that "Robinson is no further along with the Sisyphean task of getting an answer from the Department." *Id.*

153. For a further discussion of how the EHB ignored contract law, see *infra* notes 166-173 and accompanying text.

154. See *Robinson Coal*, 2015 WL 1501150, at *21 (changing compliance point from permit boundary to ALD outlet). This modification does not allow acidic water to flow through the settling basin, which is the primary way to reduce iron content. *Id.* at *6.

155. See *Chesapeake Appalachia, L.L.C. v. Dep't of Env'tl. Prot.*, 89 A.3d 724, 726 (Pa. Commw. Ct. 2014) (defining "action"); see also *Redbank Valley Mun. Auth. v. Dep't of Env'tl. Prot.*, No. 2005-262-L, 2006 EHB 813, 819 (Pa. Env'tl. Hearing Bd. Nov. 9, 2006) (reviewing EHB's jurisdictional authority).

156. See *Chesapeake Appalachia*, 89 A.3d at 726-27 (reviewing statutory limitations, and subsequently finding orders affirming preexisting obligations are not appealable). An order simply restating a parties' existing obligation "is not a decision from which an appeal may be taken." *Id.* at 727.

157. See *Robinson Coal*, 2015 WL 1501150, at *11-12 (vacating paragraph one after meeting and paragraph two after Robinson submitted water quality reports).

158. See *Winegardner v. Commonwealth*, No. 2002-003-L, 2002 EHB 790, 793 (Pa. Env'tl. Hearing Bd. Sept. 17, 2002) (holding parties cannot use appeal to attack prior Departmental action).

159. See *id.* (confirming EHB limitations); 35 PA. CONS. STAT. § 7514(a) (1988) (delineating EHB's jurisdiction); see also *Robinson Coal*, 2015 WL 1501150, at *25 (Labuskes, J., concurring in part, and dissenting in part) (noting majority's unprecedented action).

dictional statute and years of precedent when it found an abuse of discretion in the 2002 CO&A because Robinson never appealed that order.¹⁶⁰ Consequently, the EHB found an abuse of discretion relating to the Department's "decision to seek to impose . . . perpetual responsibility on Robinson without" allowing them to "demonstrate that treatment [was] no longer necessary."¹⁶¹ The 2010 Order contained no mention of imposing perpetual responsibility on Robinson.¹⁶² The Department's action on appeal was, undoubtedly, the 2010 Order merely outlining Robinson's statutory violations, and not the 2002 CO&A, on which the EHB erroneously focused its attention.¹⁶³

Rather than providing statutory or precedential rationale in support of its authority to review the 2002 CO&A, the EHB pointed primarily to the Department's lack of responsiveness to Robinson's requests for discussions.¹⁶⁴ Based on this apparent validation, the EHB decided it would alter the terms of a thirteen-year-old, privately negotiated agreement between two sophisticated parties without any basis.¹⁶⁵

B. The EHB Failed to Adhere to Basic Contract Law

As argued by the Judge Labuskes in his dissent, the EHB violated fundamental principles of contract law by rewriting the terms of the 2002 CO&A to alter the compliance point.¹⁶⁶ The Department and Robinson negotiated the 2002 CO&A, in which the Department released \$200,969 of treatment bonds to Robinson, and Robinson funded a \$25,893 treatment trust fund.¹⁶⁷ The fifth para-

160. See *Robinson Coal*, 2015 WL 1501150, at *19 (finding Department abused its discretion in 2002 CO&A).

161. *Id.* (providing reasoning for Department's abuse of discretion).

162. *Id.* at *11 (presenting 2010 Order terms).

163. *Id.* at *1 (noting date of appeal). "Robinson filed an appeal with the Board of the Department's November 17, 2010 compliance order in which it challenged the Department's action." *Id.*

164. *Id.* at *17-20 (describing decision to establish new compliance point). The court based its decision on the Department's failure to respond to Robinson. *Id.*

165. See *Robinson Coal*, 2015 WL 1501150, at *20 (altering 2002 CO&A between Department and Robinson); see also *id.* at *27 (Labuskes, J., concurring in part, and dissenting in part) (arguing majority disregarded contract law).

166. See *id.* at *27-28 (Labuskes, J., concurring in part, and dissenting in part) (expressing concern with majority for altering terms of 2002 CO&A); see also *Global Eco-Logical Servs., Inc. v. Commonwealth*, 789 A.2d 789, 796 (Pa. Commw. Ct. 2001) (finding that courts "should only modify [a consent order and agreement's] terms, which were negotiated by the parties, with great reluctance.").

167. See *Robinson Coal*, 2015 WL 1501150, at *7 (detailing 2002 CO&A financials).

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graph of the agreement included “Robinson’s obligation to ‘treat the Putt Mine discharge, and to operate and maintain the treatment system, in perpetuity, or until water treatment is no longer necessary.’”¹⁶⁸ This clause was bargained for by competent parties, with the assistance of counsel, and, pursuant to contract law, the EHB should have protected the parties’ reasonable expectations.¹⁶⁹

For these reasons, the EHB should have, at least, been unenthusiastic or reluctant to modify the terms of the agreement.¹⁷⁰ Instead, the EHB transformed the 2002 CO&A into an arrangement which was never agreed to by the parties.¹⁷¹ The parties also never explicitly asked the EHB to revise that earlier document in their appeal, as Robinson’s appeal was based solely on the Department’s 2010 Order.¹⁷² Furthermore, as the dissent noted, the EHB could have compelled the Department and Robinson to meet and discuss a more practical arrangement.¹⁷³

C. Unintentional Perpetual Treatment

When the EHB unilaterally changed the compliance point from the permit boundary to the ALD outlet, Robinson was improperly burdened and it is unlikely that the discharge will ever meet the statutory limitations.¹⁷⁴ This problem was briefly mentioned, but overlooked, in both the majority and dissenting opinions.¹⁷⁵ By moving the compliance point to the ALD outlet, the discharge will not receive the benefit of the settling basin, which is designed to reduce the discharge’s iron levels.¹⁷⁶ Due to this over-

168. *Id.* at *6 (detailing specifics of 2002 CO&A).

169. *See Hazleton Area Sch. Dist. v. Bosak*, 671 A.2d 277, 282-83 (Pa. Commw. Ct. 1996) (protecting bargained-for exchange of parties).

170. *See Commonwealth v. U.S. Steel Corp.*, 325 A.2d 324, 328 (Pa. Commw. Ct. 1974) (holding court should not modify mutual agreement of parties).

171. *See Robinson Coal*, 2015 WL 1501150, at *18-19 (deciding on ALD outlet as new compliance point under 2002 CO&A).

172. *Id.* at *1 (stating appeal’s origins). This appeal stemmed from “the Department’s November 17, 2010 compliance order in which it challenged the Department’s action.” *Id.*

173. *Id.* at *27 (noting EHB could have required parties to renegotiate). For a discussion of why the EHB’s decision forces Robinson to treat the discharge forever, see *infra* notes 174-181 and accompanying text.

174. *See Reference Guide to Treatment Technologies*, *supra* note 42, at 13 (describing importance and usefulness of settling basin in passive treatment system).

175. *See Robinson Coal*, 2015 WL 1501150, at *18 (noting necessity of settling basin and ditch); *see also id.* at *29 (Labuskes, J., concurring in part and dissenting in part) (stating new compliance point “deprives Robinson of [] benefits . . . provided by [] pond and [] ditch.”).

176. *See id.* at *18 (majority opinion) (detailing settling basins in passive treatment systems).

sight, iron levels are unlikely to be reduced by any meaningful amount prior to compliance testing, and will likely consistently violate Section 87.102.¹⁷⁷ As a result, the EHB has forced Robinson to indefinitely treat the discharge because the ALD outlet discharge will not have iron removed via the settling basin prior to sampling.¹⁷⁸

Although the EHB recognized the importance of the settling basin and noted the difficulty in using a point further along in the system, it still decided to use the ALD outlet because there was no other location to measure compliance.¹⁷⁹ The EHB, however, could have ordered the Department and Robinson to discuss a more practical solution that would align with their respective interests moving forward.¹⁸⁰ Additionally, Robinson had not incurred any expenses in the last seventeen years in treating the discharge; perhaps simply waiting and not altering the parties' agreement would have been a better course of action for the EHB.¹⁸¹

VI. IMPACT

The EHB's decision did not *immediately* affect Robinson because the 2010 Order was withdrawn and it was clear that the Putt Mine discharge still violated statutory limitations.¹⁸² This ruling's influence, however, will extend into the future because Robinson will likely be forced to treat the discharge indefinitely.¹⁸³ The EHB's decision also considerably increased its power, and the EHB will almost certainly use this case as precedent to impermissibly review otherwise unappealable actions and alter terms of agreements not on appeal.¹⁸⁴ The EHB's willingness to find the Department abused its discretion eight years prior to the 2010 Order is alarm-

177. *See id.* at *12 (finding iron levels consistently exceed applicable effluent limitations).

178. *Id.* at *18 (describing new compliance point and location).

179. *See id.* (noting continuing importance of settling basin and ditch).

180. *Robinson Coal*, 2015 WL 1501150, at *27 (Labuskes, J., concurring in part and dissenting in part) (noting EHB could have allowed parties to take whatever other actions they deemed appropriate).

181. *Id.* at *30 (discussing last seventeen years of Robinson's expenses for treatment).

182. For a discussion of the facts surrounding the 2010 Order, see *supra* notes 49-59 and accompanying text.

183. *See Robinson Coal*, 2015 WL 1501150, at *18 (discussing Department's extreme position).

184. For a discussion of how the EHB acted in excess of its delegated power, see *supra* notes 142-150 and accompanying text.

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ing, because the EHB does not have had the power to do so.¹⁸⁵ Additionally, the EHB's disregard for its statutory and precedential requirements provides little guidance or consistency to the various coal companies in determining whether to appeal Department actions.¹⁸⁶

The EHB could have laid out Robinson's statutory violations, noted the 2002 CO&A's inadequacy, and required the parties to revise their agreement and meet regularly in the future.¹⁸⁷ Such a framework would have proceeded within the EHB's mandated power and would have likely been amenable to the parties.¹⁸⁸ If the case proceeded this way, the Department and Robinson could have negotiated treatment deadlines reflecting their respective environmental and economic concerns.¹⁸⁹ Unfortunately, the EHB decided to take such an unauthorized and unprecedented action.¹⁹⁰

The *Robinson Coal* case may demonstrate the furthest extent a quasi-judicial, regulatory appeals hearing board will go towards achieving what it believes to be an equitable result.¹⁹¹ The EHB's decision will force both the Department and various coal companies to reevaluate the terms of their respective ongoing agreements.¹⁹² Furthermore, the decision will require parties to consider whether those agreements adequately provide methods to determine regulatory compliance and discharge statutory obligations.¹⁹³ Given these considerations, it is apparent the *Robinson*

185. For a more in-depth discussion of how the EHB determined the Department abused its discretion, see *supra* notes 138-140 and accompanying text.

186. For a discussion of EHB statutory requirements, see *supra* notes 94-102 and accompanying text. For a discussion of EHB precedential guidelines, see *supra* notes 103-112 and accompanying text.

187. *Robinson Coal*, 2015 WL 1501150, at *23 (Labuskes, J., concurring in part and dissenting in part) (noting how appeal could have been resolved more easily).

188. For a more in-depth discussion of the EHB's legislatively and judicially allotted power, see *supra* notes 94-112 and accompanying text.

189. For a critical analysis of what steps the EHB should have taken, see *supra* notes 164-165 and accompanying text.

190. For a discussion of what the EHB changed in the 2002 CO&A as well as its further actions, see *supra* notes 125-140 and accompanying text.

191. For a discussion of how the EHB went too far in its decision, see *supra* notes 142-150 and accompanying text.

192. For a critical explanation of how the EHB altered privately negotiated terms in the 2002 CO&A, see *supra* notes 166-173 and accompanying text.

193. For a discussion of the EHB's decision regarding when treatment would no longer be necessary, see *supra* notes 126-131 and accompanying text.

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Coal decision will significantly impact the way coal companies interact and draft agreements with the Department in the future.¹⁹⁴

*Ryan P. Duffy**

194. For a discussion of why the EHB's decision will impact Pennsylvania's coal companies, see *supra* notes 182-190 and accompanying text.

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